# Barclays Bank Plc v Malaysian Sea Best Sdn Bhd & Anor

HIGH COURT (KUALA LUMPUR) — SUIT NO D8–22–311 OF 2008
HASNAH HASHIM J
17 APRIL 2013

*Evidence — Expert evidence — Signature — Statutory declarations and board of directors resolution — Allegation of forgery — Handwriting expert — Evidential value of — Principal object of expert evidence*

*Evidence — Standard of proof — Balance of probabilities — Signature on statutory declarations — Allegation of forgery — Whether beyond reasonable doubt or on balance of probabilities*

*Negotiable Instruments — Promissory note — Holder in due course — Plaintiff accepted promissory note in good faith and for value with no notice of defect of title — PN dishonored for non-payment — Defences — Falsification/forgery of documents — Whether signatures on statutory declarations forged — Whether second defendant's board of directors resolution falsified — Whether issue of falsification/forgery, any defect of title or other personal defences available to second defendant against plaintiff's claim — Whether plaintiff conducted proper and thorough due diligence — Bills of Exchange Act 1949 ss 29 & 38(b)*

The plaintiff claimed against the second defendant a sum of €10m pursuant to a 'Per Aval' endorsement executed by the second defendant on a promissory note ('PN'). Vide the said endorsement the second defendant had expressly agreed to make the above payment for the account of the first defendant. In consideration of value it received, the first defendant had promised to pay against the said PN the above sum to the order of HSBC Bank USA. The terms in the said PN provides, inter alia, that the said amount was payable at the Malayan Banking Bhd (Semenyih Branch) ('MBB'). Further, the effective payment of the said PN was to be made in Euro (€) only, without any deduction for and free of any taxes, collection, charges, impost, levies or duties present or future of any nature whatsoever, without set off or counterclaim. Pursuant to the terms of the said PN, the plaintiff had duly presented the original PN for payment at the counter of the MBB Semenyih branch. However, the said PN was dishonored for non-payment by MBB. Hence, the plaintiff's claim against the second defendant as an endorser of the said PN, the value of the said PN. The plaintiff accepted the said PN in good faith and for value with no notice of defect of title to the same by HSBC USA assigning and

transferring without recourse all its rights, title and interest in the said PN by way of a transfer power which was duly endorsed by HSBC USA for value it received from the plaintiff. The second defendant however, raised the issue of the falsification of the documents concerning the PN. The second defendant contended that the signatures of Mohd Nor bin Hassan as well as that of Mohd Khairuddin ('the signatories') were forged as the said PN was never executed by the signatories. Further, the second defendant's board of directors resolutions were also falsified.

**Held**, allowing the plaintiff's claim with costs:

(1) The plaintiff was a bona fide holder in due course of the said PN who had taken the said PN in good faith, for value paid to HSBC USA and with no notice of any defect of title to the said PN at all material times. As for the issue of falsification/forgery, any defect of title or other personal defences which were issues (if any) that maybe available to the second defendant may have with the first defendant and/or HSBC USA, being the prior parties to the plaintiff, was not available to the second defendant as a defence against the plaintiff's claim herein where the plaintiff was a holder in due course of the said PN (see paras 35 & 25).

(2) Both the documentary and oral evidence clearly showed that the plaintiff in fact had conducted proper enquiry. The statutory declarations, board of directors resolutions, SWIFT Confirmation and the letter from Bank Negara clearly showed that before accepting the assignment of the PN, the plaintiff had perused all the documents. This was confirmed not only by PW1 but also PW2 (Bank Negara officer) and PW3 (Maybank officer). The plaintiff was therefore not negligent but had conducted proper and thorough due diligence (see para 36).

(3) Based on the evidence of the chemist the signatures on the statutory declarations and the board of directors resolution were not forged, the plaintiff, as a holder for value of the said PN, accepted the said PN in good faith and for value with no notice of defect of title to the same by HSBC USA assigning and transferring without recourse all its rights, title and interest in the said PN by way of a transfer power which was duly endorsed by HSBC USA for value it received from the plaintiff. Hence, the plaintiff as a holder in due course was entitled to be paid by the second defendant (see paras 43 & 51).

**[Bahasa Malaysia summary**

Plaintif telah menuntut terhadap defendan kedua sejumlah €10 juta menurut pengendorsan 'Per Aval' yang disempurnakan oleh defendan kedua atas nota janji hutang ('NJH'). Melalui pengndorsan tersebut defendan kedua dengan nyata bersetuju untuk membuat bayaran tersebut untuk akaun defendan pertama. Sebagai balasan nikai yang diterimanya, defendan pertama telah

berjanji untuk membayar terhadap NJH tersebut jumlah yang dinyatakan kepada perintah Bank HSBC Amerika Syarikat. Terma-terma dalam NJH tersebut memperuntukkan, antara lain, bahawa jumlah tersebut perlu dibayar di Malayan Banking Bhd (Semenyih Branch) ('MBB'). Selanjutnya, bayaran berkesan BJH tersebut telah dibuat dalam matang Euro (€) sahaja, tanpa apa-apa potongan untuk dan bebas daripada apa-apa cukai, kutipan, caj, impos, levi atau kewajipan sekarang dan masa hadapan dalam apa-apa sifat, tanpa penepian atau tuntutan balas. Menurut terma-terma NJH tersebut, plaintif telahpun mengemukakan NJH asal untuk bayaran di kaunter cawangan MBB Semenyih. Walau bagaimanapun, NJH tersebut tak laku kerana tiada pembayaran oleh MBB. Justeru, tuntutan plaintif terhadap defendan kedua sebagai pengesah NJH tersebut, nilai NJH tersebut. Plaintif telah menerima NJH tersebut dengan niat baik dan dengan nilai tanpa notis kecacatan hak milik kepada yang sama oleh HSBC AS yang menerima serah hak dan memindah hak tanpa menuntut hak semua hak, hak milik dan kepentingannya dalam NJH tersebut melalui kuasa pindah milik yang telahpun disahkan oleh HSBC AS untuk nilai yang diterimanya daripada plaintif. Defendan kedua bagaimanapun, telah menimbulkan isu pemalsuan dokumen-dokumen berkaitan NJH tersebut. Defendan kedua berhujah bahawa tandatangan-tandatangan Mohd Nor bin Hassan dan juga Mohd Khairuddin ('penandatangan-penandatangan') telah dipalsukan kerana NJH tersebut tidak pernah disempurnakan oleh penandatangan-penandatangan itu. Selanjutnya, resolusi-resolusi lembaga pengarah defendan kedua juga telah dipalsukan.

**Diputuskan**, membenarkan tuntutan plaintif dengan kos:

(1) Plaintif adalah pemegang bona fide NJH tersebut dalam masa terdekat yang telah mengambil NJH tersebut dengan niat baik, untuk nilai yang telah dibayar kepada HSBC AS dan tanpa notis tentang apa-apa kecacatan hak milik kepada NJH tersebut pada setiap masa matan. Berhubung isu pemalsuan, apa-apa kecacatan hak milik atau pembelaan peribadi lain yang merupakan isu-isu (jika ada) yang mungkin wujud kepada defendan kedua dengan defendan pertama dan/atau HSBC AS yang merupakan pihak-pihak sebelum plaintif, tidak wujud kepada defendan kedua sebagai pembelaan terhadap tuntutan plaintif di mana plaintif merupakan pemegang NJH tersebut dalam masa terdekat (lihat perenggan 35 & 25).

(2) Kedua-dua keterangan dokumentar dan lisan jelas menunjukkan bahawa plaintif sememangnya telah menjalankan siasatan yang sepatutnya. Deklarasi-deklarasi statutory, resolusi-resolusi lembaga pengarah, Pengesahan SWIFT dan surat daripada Bank Negara jelas menunjukkan bahawa sebelum menerima penyerahan NJH tersebut, plaintif telah meneliti semua dokumen-dokumen tersebut. Ini telah disahkan bukan sahaja oleh PW1 tetapi juga PW2 (pegawai Bank Negara) dan PW3

(pegawai Maybank). Plaintif dengan itu tidak cuai tetapi telah pun melakukan ketekunan wajar yang sesuai dan menyeluruh (lihat perenggan 36).

(3) Berdasarkan keterangan ahli kimia bahawa penandatangan-penandatangan tentang deklarasi-deklarasi statutori dan resolusi lembaga pengarah tidak dipalsukan, plaintif sebagai pemegang untuk nilai NJH tersebut, telah menerima NJH tersebut dengan niat baik dan untuk nilai tanpa notis kecacatan hak milik yang sama oleh HSBC AS yang diserah hak dan dipindah milik tanpa menuntut semua hak, hak milik dan kepentingannya dalam NJH tersebut melalui kuasa pindah milik yang telah pun disahkan oleh HSBC AS untuk nilai yang diterimanya daripada plaintif. Justeru, plaintif sebagai pemegang dalam tempoh terdekat berhak dibayar oleh defendan kedua (lihat perenggan 43 & 51).]

**Notes**

For cases on balance of probabilities, see 7(2) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 2761–2762.

For cases on signature, see 7(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 1860–1861.

**Cases referred to**

*Bank Fur Gemeinwirtschaft v City of London Garages Ltd and others* [1971] 1 WLR 149, CA (refd)

*Dr Shanmuganathan v Periasamy s/o Sithambaram Pillai* [1997] 3 MLJ 61; [1997] 2 CLJ 153, FC (refd)

*Jones v Gordon* (1877) 2 App Cas 616, HL (refd)

*Mercantile Bank Ltd, Ipoh v Yoon Siew Kang* [1969] 1 MLJ 174; [1969] 1 LNS 107, FC (refd)

*Murari Lal v State of MP* AIR 1980 SC 531, SC (refd)

*Swan v The North British Australasian Co Ltd* (1863) 159 ER 73; (1863) 2 H & C 175 (refd)

*United Asian Bank Bhd v Tai Soon Heng Construction Sdn Bhd* [1993] 1 MLJ 182; [1993] 2 CLJ 31, SC (refd)

**Legislation referred to**

Bills of Exchange Act 1949 ss 24, 29, 29(1)(b), 38(b)
Companies Act 1965

*Jeyanthi (Izaharani and Marina with her) (Shearn Delamore & Co) for the plaintiff/respondent.*
*Faizah (Sulaiman with her) (Azmi & Associates) for the defendant/appellant.*

**Hasnah Hashim J:**

BACKGROUND

**[1]** The plaintiff is a bank registered in England with a registered office at 1 Churchill Place, London E14 5HP and is member of the London Stock Exchange. The plaintiff is authorised to carry on banking business and is regulated by the United Kingdom Financial Services Authority.

**[2]** The first defendant is a company, incorporated in Malaysia pursuant to the Companies Act 1965 with a registered address at 264B, Tingkat 2, Jalan Bandar 12, Metro Malawati, 53100 Kuala Lumpur and a business address at No 12, Jalan P2/1, Seksyen 2, Bandar Teknologi Kajang, Semenyih 43500 Kajang, Selangor.

**[3]** The second defendant is a company, incorporated in Malaysia with its registered address at Lot 28.1, 28th Floor, Menara Maybank, 100 Jalan Tun Perak, 50050 Kuala Lumpur and a business address at 3rd Floor, No. 22, Jalan 4/146, Metro Centre, Bandar Tasik Selatan and No 22, Jalan 4/146, Metro Centre, Bandar Tasik Selatan, 57000 Kuala Lumpur.

**[4]** By a promissory note made by the first defendant on 1 March 2006 under reference SeaBest/EURO/HSBC1 for €10,000,000 ('the said promissory note'), the first defendant in consideration of value it received, promised to pay against the said promissory note on 1 March 2008 a sum of €10,000,000 (to the order of HSBC Bank USA, National Association, 10 East 40th Street, New York, NY 10016-0200 ('HSBC USA').

**[5]** The terms of the said promissory note:

(a) the said promissory note is payable on 1 March 2008 at the counters of Malayan Banking Bhd (Semenyih Branch), 1 & 2, Taman Semenyih, 43500 Semenyih, Selangor Darul Ehsan, Malaysia, Current Account No 512521129097 ('MBB'); and

(b) effective payment of the said promissory note is to be made in Euro only, without deduction for and free of any taxes, collection, charges, impost, levies or duties present or future of any nature whatsoever, without set off or counterclaim.

**[6]** By a 'Per Aval' endorsement executed on the said promissory note by the

second defendant, the second defendant agreed to make payment of €10,000,000 for the account of the first defendant.

**[7]** The plaintiff contended that the second defendant had, by words or conduct, represented to the plaintiff that one Mohd Nor bin Hassan and one Mohd Khairuddin bin Abu Bakar ('the said persons') had authority to act on behalf of the second defendant, and is therefore, bound by the acts of such persons as if such persons had the authority they were represented to have, even if they do not have such authority.

**[8]** Pursuant to such authority, the said persons executed the 'Per Aval' guarantee endorsement and the accompanying side letter supporting the promissory note. Mohd Nor was the chief executive officer and a director of second defendant, whilst Encik Khairuddin was the senior manager for sales and marketing of the second defendant.

**[9]** The said persons executed the two statutory declarations dated 5 October 2005 respectively supporting the promissory note. The second defendant's memorandum of association, which was made available to the plaintiff, did not deprive either of the said persons the capacity to execute the promissory note on behalf of the second defendant.

**[10]** By a directors' board resolution dated 14 February 2006 the directors of the second defendant authorised the second defendant to endorse the promissory note.

**[11]** It is the contention of the plaintiff that the plaintiff, being a party acting in good faith, was entitled to assume the relevant internal procedures in relation to the execution of the 'Per Aval' guarantee endorsement have been complied with, and was therefore entitled to assume that the promissory note was good in law.

**[12]** By a transfer power dated 15 March 2006, HSBC USA for value it received, assigned and transferred to the plaintiff without recourse all of its rights, title and interest in the said promissory note. Pursuant to the terms of the said promissory note, the plaintiff as the holder in due course of the said promissory note did on 3 March 2008 (1 March 2008 being a Saturday) duly presented the original promissory note for payment at the counters of MBB. The said promissory note was dishonored for non-payment by MBB on 3 March 2008.

**[13]** The plaintiff by a letter dated 3 March 2008 to the defendants gave the defendants notice of dishonor of the said promissory note and demanded that

the defendants make immediate payment of €10,000,000. The defendants however failed, neglected and/or refused to make payment of the aforesaid sum.

**[14]** The plaintiff through its solicitors did by letters dated 6 March 2008 to the defendants demand that the defendants make immediate payment and/or by latest 5pm, 7 March 2008 the sum of €10,000,000. In breach of the said promissory note, the defendants failed and neglected to pay the sum of €10,000,000 or any part thereof.

**[15]** The plaintiff claims against the second defendant's are as follows:

(a) the sum of €10,000,000;

(b) interest at 4.11% on the sum of €10,000,000 from 3 March 2008 until the date of judgment;

(c) costs; and

(d) further or other relief that this honourable court deems fit and proper.

**[16]** The plaintiff's claim against the second defendant for €10,000,000 is pursuant to a 'Per Aval' endorsement executed by the second defendant on a promissory note ('the PN') (marked as P22) whereby the second defendant by the 'Per Aval' endorsement to the PN have expressly agreed to make payment of €10,000,000 for the account of the first defendant. The second defendant's 'Per Aval' endorsement on the PN stipulates 'Per Aval' for the account of Malaysia Sea Best Sdn Bhd. The PN reads as follows:

| | |
|---|---|
| | 'Malaysian SeaBest Sdn. Bhd<br>Promissory Note<br>Reference:SeaBest/EURO/HSBC1 |
| Selangor Darul Ehsan, Malaysia<br>1 March 2006<br>On/at | In effective EURO €10,000,000.00<br>1 March 2008 |
| For value received we, | Malaysian Sea Best Sdn Bhd<br>No. 12, Jalan P2/1, Seksyen 2<br>Bandar Teknologi Kajang<br>Semenyih 43500 Kajang Selangor<br>Darul Ehsan, Malaysia. |
| PROMISE TO PAY against this PROMISSORY NOTE<br>To the order of: | HSBC Bank USA, National Association<br>10 East 40th Street |

| | |
|---|---|
| | New York, NY 10016-0200 |
| The Amount of: | Euro Ten Million only |
| Effective payment to be made in Euro only, without deduction for and free of any taxes, collection charges or duties present or future of any nature whatsoever, and without set-off or counterclaim. | |
| This Promissory Note Is payable at the counters of: | |
| | Malayan Banking Berhad<br>(Semenyih Branch)<br>1 & 2 Taman Semenyih<br>43500 Semenyih<br>Selangor Darul Ehsan, Malaysia<br>Current Account No. 512521129097 |
| Malaysian Sea Best Sdn. Bhd. | |
| Sign | Sign |
| … | … |
| Name: Gazali bin Rashid | Name: Rusita binti Mohd Aris |
| NRIC No. 600229-10-6583 | NRIC No. 620728-10-6332 |
| General Manager/Director | Director |
| Per A val for Account of Malaysian Sea Best Sdn. Bhd. | |
| For and on behalf of Majuikan Sdn. Bhd. | |
| Sign | Sign |
| … | … |
| Name: Mohd Nor bin Hsssan | Name.Mohd Khairuddin bin Abu Bakar |
| NRIC No. 491015-11-5193 | NRIC No. 571005-10-5311 |
| Director/Chief Executive Officer | Senior Manager'. |

**[17]** In consideration of value it received, the first defendant have promised to pay against the said PN on 1 March 2008 a sum of €10,000,000 to the order of HSBC Bank USA, National Association, 10 East 40th Street, New York, NY 10016-0200 ('HSBC USA').

**[18]** According to the terms the said PN is payable on 1 March 2008 at the counters of Malayan Banking Bhd (Semenyih Branch), 1 & 2, Taman Semenyih, 43500 Semenyih, Selangor Darul Ehsan, Malaysia, Current Account No 512521129097 ('MBB'). The effective payment of the said PN is to be made in Euro only, without any deduction for and free of any taxes,

collection, charges, impost, levies or duties present or future of any nature whatsoever, without set off or counterclaim.

**[19]** The plaintiff is a holder of the said PN by virtue of HSBC USA assigning and transferring to the plaintiff without recourse all its rights, title and interest in the said PN by way of a transfer power dated 15 March 2006 endorsed by HSBC USA for value it received:

> Transfer Power
>
> This transfer power is to be attached to and made a part of that certain promissory note(reference the 'SeaBest/EURO/HSBC1 NOTE') dated as of 1 March 2006, made by Malaysian Sea Best Sdn Bhd. In favour of HSBC Bank USA, National Association, having a principal amount of EURO €10,000,000.00.
>
> For value received, the undersigned hereby assigns and transfers unto Barclays Bank PLC, without recourse, all of its rights, titles and interest in such SeaBest/EURO/hsbc1 NOTE.

**[20]** Pursuant to the terms of the said PN, the plaintiff did on 3 March 2008 duly present the original PN for payment at the counter of the Semenyih Branch of MBB. However, the said PN was dishonored for non-payment by MBB on 3 March 2008.

**[21]** Learned counsel for the second defendant raised the issue of the falsification of the documents concerning the PN. It is the contention of the second defendant that the signatures of Mohd Nor bin Hassan as well as that of Mohd Khairuddin ('the signatories') were forged as the said PN was never executed by the signatories. The signatories were not given any authorisation and/or permission by the board of directors of the second defendant to sign the said PN. Learned counsel further submitted that the relevant resolution of the second defendant's board of directors was also falsified.

FINDINGS AND REASONS

**[22]** Section 29 of the Bills of Exchange Act 1949 ('the Act') provides as follows:

> 29 Holder in due course.
>
> (1) A holder in due course is a holder who has taken a bill, complete and regular on the face of it, under the following conditions, namely:
>
> (a) that he became the holder of it before it was overdue, and without notice that it had been previously dishonoured, if such was the fact;
>
> (b) that he took the bill in good faith and for value, and that at the time the bill was negotiated to him, he had no notice of any defect in the title of the person who negotiated it.

(2) In particular the title of a person who negotiates a bill is defective within the meaning of this Act when he obtained the bill, or the acceptance thereof, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud.

(3) A holder (whether for value or not) who derives his title to a bill through a holder in due course, and who is not himself a party to any fraud or illegality affecting it, has all the rights of that holder in due course as regards the acceptor and all parties to the bill prior to that holder.

**[23]** The plaintiff's claim against the second defendant as an endorser of the said PN, is in the capacity of the plaintiff as a holder for value of the said PN. The plaintiff accepted the said PN in good faith and for value with no notice of defect of title to the same by HSBC USA assigning and transferring without recourse all its rights, title and interest in the said PN by way of a transfer power dated 15 March 2006 which was duly endorsed by HSBC USA for value it received from the plaintiff.

**[24]** Section 38(b) of the Act provides:

b) where he is a holder due course, he holds the bill free from any defect of title of prior parties, as well as from mere personal defences available to prior parties among themselves, and may enforce payment against all parties liable on the bill; ….

**[25]** Therefore the issue of falsification/forgery, any defect of title or other personal defences which are issues (if any) that maybe available to the second defendant may have with the first defendant and/or HSBC USA being the prior parties to the plaintiff is not available to the second defendant as a defence against the plaintiff's claim herein where the plaintiff is a holder in due course of the said PN.

**[26]** The Federal Court in *Mercantile Bank Ltd, Ipoh v Yoon Siew Kang* [1969] 1 MLJ 174; [1969] 1 LNS 107 held the bank being a holder in due course, who took the cheques in good faith and for value and had no notice of any defect in the title of the party who negotiated them to the bank is entitled to recover the amount on the cheques despite the cheques being given fraudulently by the defendant to a third party before being negotiated to the bank:

Negligence on the part of the defendant in letting these cheques loose on the public would make no difference to his liability to an honest holder for value. Even if it is true (as found by the judge) that there was no consideration for these cheques which were handed over to MacPhail simply to deceive the bank with no intention that they be used or negotiated by MacPhail and that they were negotiated by MacPhail contrary to the intention of the conspirators, still the defendant would be liable —

provided that bank took them for value in good faith without notice of MacPhail defect in title. If Mr Braine's gross negligence had prevented him from acquiring such notice, the defendant would still be liable. Equally Mr Braine's carelessness or foolishness in not suspecting that there was something wrong about these cheques would not in any way affect the defendant's liability. But if there were circumstances in the transactions that might have led Mr Braine to suspect that there was something wrong and yet because he was honestly blundering and careless he took the cheques without further inquiry, the bank would still be entitled to recover. On the other hand, if he was not honestly blundering and careless but thought in his own secret mind there was something wrong and if he asked questions and made further inquiry it would no longer be his suspecting it but his knowing it, then that would be dishonesty and the bank would not be able to recover. If he had shut his eyes to the facts presented to him and put his suspicions aside without further inquiry he had not acted in good faith. The existence of suspicion or doubt is inconsistent with good faith.

**[27]** The case of *Swan v The North British Australasian Co Ltd* (1863) 159 ER 73; 2 H & C 175 was referred to by the Federal Court where Byles J said at p 77:

> The object of the law merchante, as to bills is to secure their circulation as money; therefore honest acquisition confers title. To this despotic but necessary principle the ordinary rules of the common law are made to bend. The misapplication of a genuine signature written across a slip of stamped paper (which transaction being a forgery would in ordinary cases convey no title) may give a good title to any sum fraudulently inscribed [on the paper] … Negligence, in the maker of an instrument payable to bearer, makes no difference in his liability to an honest holder for value; the instrument may be lost by the maker without his negligence or stolen from him, still he must pay. The negligence of the holder, on the other hand, makes no difference in his title. However, gross the holder's negligence, if it stops short fraud he has a title.

**[28]** The Federal Court also referred to the speech of Lord Blackburn in *Jones v Gordon* (1877) 2 App Cas 616 where His Lordship said:

> … if it can be shown that a bill of exchange at its inception was not a good bill of exchange and that originally it was obtained by fraud, yet a person who has taken it bona fide and for value is entitled to sue upon it even though is its shown that there was an infirmity or vice in the title of some of those persons who passed it unless the knowledge of that vice is brought home to him who took it.

**[29]** In the case *Bank Fur Gemeinwirtschaft v City of London Garages Ltd and others* [1971] 1 WLR 149 the Court of Appeal allowed a summary judgment application brought by a holder in due course and held the defences of fraud

and illegality failed where there is unchallenged evidence that the plaintiff as a holder of the bills of exchange have given value in good faith for the bills of exchange.

**[30]** PW1, Mark Christensen is the plaintiff's director of credit trading. In his witness statement ('WS') he explained and confirmed the PN was issued by the first defendant on 1 March 2006 in favour of HSBC Bank, USA ('HSBC'). The first defendant had agreed to pay the sum of Euro 10m on 1 March 2008 against the promissory note at the counters of Malayan Banking Bhd Semenyih Branch in consideration of the sums advanced.

**[31]** PW1 in his WS also explained the events leading to the issuance of the PN and how the plaintiff came to hold the said PN:

> Q/A5:
> A In August 2005, Cambridge Securities, a securities broker based in Cambridge, Massachussetts and acting as introducing broker for MS Trade Finance, a trade finance broker based in New York, approached the plaintiff with a proposal to lend to the first defendant. We were told that the first defendant was a supplier of seafood products under contract to the second defendant. The lending was to be secured by the Promissory Note, as guaranteed by the second defendant.
>
> An arrangement was reached whereby HSBC was to provide the lending and thereafter assign the Promissory Note to the plaintiff in consideration of the plaintiff purchasing the loan from HSBC. The plaintiff would therefore become holder in due course of the Promissory Note.
>
> A due diligence process was commenced on both Defendant in keeping with our 'know your client procedure' and between October 2005 to December 2005.

**[32]** He also gave evidence that the second defendant was required to instruct its bankers in Malaysia ie MBB and Bumiputra-Commerce Bank Bhd ('BCB') to confirm the details of the second defendant's accounts and its authorised signatories via SWIFT to HSBC for the purposes of the guarantee. On 13 March 2006 Maybank transmitted to SWIFT to HSBC confirming that Mohd Nor Hassan and Khairuddin Abu Bakar were the authorised signatories of the second defendant. This was confirmed by PW3, Maimon Rahman who was the manager of the MBB Raja Laut Branch. PW3 also confirmed that she had personally sent the letter to Tuan Hj Adam whether the bank should proceed with the confirmation as requested before they respond to HSBC. PW3 had in fact told Tuan Hj Adam that the letter is in relation to a financing facility totaling 10m Euros. As explained by PW3, Tuan Hj Adam had given instruction in writing on the said letter marked as P26 as follows:

> Puan Maimon Rahman

Manager, Maybank Jalan Raja Laut, KL

Please be noted that the letter dated 23rd February 06 is in order and the bank can prove with the confirmation to HSBC NY.

Haji Adam bin Abdul Hamid

sgd

15.3.2006.

**[33]** After obtaining the instruction Maybank immediately sent the confirmation to HSBC (P19).

**[34]** Based on the evidence before this court, I am of the view that that the plaintiff is a holder in due course of the said PN having taken the same in good faith and for value from HSBC USA any defect of title to the said PN. The plaintiff is a 'holder in due course' of the said PN as stipulated under s 29(1)(b) of the Act as the plaintiff took the said PN from HSBC USA in good faith and for value with no notice.

**[35]** Therefore based on the evidence both oral and documentary the plaintiff is a bona fide holder in due course of the said PN who had taken the said PN in good faith, for value paid to HSBC USA and with no notice of any defect of title to the said PN at all material times. The second defendant is obligated to make payment in respect of the PN.

WHETHER THE PLAINTIFF WAS NEGLIGENT

**[36]** Learned counsel for the second defendant submitted that the plaintiff was negligent for not conducting a proper investigation and/or enquiry into the said PN. Both the documentary and oral evidence show that the plaintiff did in fact conduct proper enquiry. The statutory declarations the side letter, BOD resolutions SWIFT Confirmation the letter from Bank Negara clearly show that before accepting the assignment of the PN the plaintiff had perused all the documents. This is confirmed not only by PW1 but also PW2 (Bank Negara officer) and PW3 (Maybank officer). I am satisfied based on the evidence before me that the plaintiff was not negligent and had conducted proper and thorough due diligence.

WHETHER THE SECOND DEFENDANT EXECUTED THE PER AVAL INDORSEMENT ON THE PN

**[37]** It is the contention of the second defendant that the second defendant is not the maker or the endorser of the 'Per Aval' endorsement on the PN. The signatures of both Mohd Khairuddin and DW2 (Mohd Nor Hassan) were forged.

**[38]** The evidence by a handwriting expert can never be conclusive because it is only opinion evidence. It is trite law that the principal object of expert evidence is merely to assist the court to form its own opinion. The Federal Court in the case of *Dr Shanmuganathan v Periasamy s/o Sithambaram Pillai* [1997] 3 MLJ 61; [1997] 2 CLJ 153 referred to the Supreme Court of India's decision in the case of *Murari Lal v State of MP* AIR 1980 SC 531 at p 534 where it was held that:

> … the science of identification of handwriting is not nearly so perfect and the risk is, therefore, higher. But that is a far cry from doubting the opinion of a handwriting expert as an invariable rule and insisting upon substantial corroboration in every case, howsoever the opinion may be backed by the soundest of reasons. It is hardly fair to an expert to view his opinion with an initial suspicion and to treat him as an inferior sort of witness … His opinion has to be tested by the acceptability of the reasons given by him. An expert deposes and not decides. His duty is 'to furnish the judge with the necessary scientific criteria for testing the accuracy of his conclusion, so as to enable the judge to form his own independent judgment by the application of these criteria to the facts proved in evidence.

THE CHEMIST REPORT

**[39]** The chemist report is marked as D49 (pp 293–296 CBD). DW14, Puan Nur Musliha bt Mohamad Nor is the chemist who had examined the handwritings on the following documents:

(a) Majuikan Resolution dated 14 February 2006 bearing the signatures of the board of directors;

(b) a Malaysian Sea Best Sdn Bhd document bearing the signature of Mohd Nor (DW2) and Mohd Khairuddin;

(c) the statutory declarations bearing the signatures Mohd Nor and Mohd Khairuddin;

(d) promissory note dated 1 March 2006 bearing the signature in respect of Mohd Nor and Mohd Khairuddin; and

(e) *senarai kehadiran* to the BOD.

**[40]** In her report she states that:

> The questioned signature on 'R' on 'C1' showed similarities in handwriting characteristics to the specimen signatures 'R1' on 'FE' to 'FJ'. Hence I am of the opinion that this questioned signature was written by the writer of the specimens …

**[41]** Therefore it is the chemist findings that the signature of Mohd Nor on the statutory declaration was not forged.

**[42]** With regards to the signature of Mohd Khairuddin on the statutory declarations she states in the report:

> The questioned signature on 'R' on 'D1' showed similarities in handwriting characteristics to the specimen signatures 'X1' on 'F1', 'FK' and 'FQ' to 'FT'. Hence I am of the opinion that this questioned signature was written by the writer of the specimens …

**[43]** Therefore both the signatures on the statutory declarations are not forged.

**[44]** The signatures on the board of directors resolutions had evidence of overwriting indicating that were traced signatures. DW14 is of the opinion that the signatures were not genuine. However, during cross-examination she did not rule out the possibility that the signatures could have been traced by the writer of the signatures.

**[45]** DW2, Tuan Hj Mohd Nor Hassan began his career with the second defendant in 1973. His last post before his retirement was as CEO. At the time of the signing of the document he was the deputy DG LKIM and also a director of the second defendant. Yet he took no follow up action to check the documents before he signed and even after he signed. Being a senior government servant as well as a director of the second defendant a transaction of this amount should have triggered some alarm bell and he should have on his own conducted due diligence. This was not a RM2,000 loan application from a fisherman to buy a fishing net but an offshore loan transaction involving Euro 10 million. DW2 himself confirmed that he had signed the statutory declaration. This is what he said in evidence:

> Saya diminta menandatangani jadi saya tandatanganlah …

**[46]** DW2 admitted in evidence that he had signed the statutory declaration affirming his authority to execute the 'Per Aval' guarantee on behalf of the second defendant.

**[47]** The standard of proof in a case based on an allegation of forgery is on a balance of probabilities, the authority being the Supreme Court case of. It was held in *United Asian Bank Bhd v Tai Soon Heng Construction Sdn Bhd* [1993] 1 MLJ 182; [1993] 2 CLJ 31 that:

> The standard of proof required in a case of forgery on the facts of such a case as the one before the court is not that of beyond reasonable doubt, but of a balance of probabilities.

**[48]** In the same case the court held that:

> The issue whether a signature on a document has been forged is a question of fact. It is eminently a matter for the trial court to determine after considering the credibility of witnesses it has seen and heard and taking into account expert evidence on the point. Of course, a trial judge is not entitled to abdicate his function by allowing an expert to determine the question.

**[49]** In the instant case based on the evidence of the chemist and DW2 the signatures are not forged.

FORGED OR UNAUTHORISED SIGNATURE

**[50]** Section 24 of the Bills of Exchange Act provides:

> Subject to the provisions of this Act, where a signature on a bill is forged or placed thereon without the authority of the person whose signature it purports to be, the forged or unauthorized signature is wholly inoperative, and no right to retain the bill or to give a discharge therefore or to enforce payment thereof against any party thereto can be acquired through or under that signature, unless the party against whom it is sought to retain or enforce payment of the bill is precluded from setting up the forgery or want of authority:
>
> Provided that nothing in this section shall affect the ratification of an unauthorized signature not amounting to a forgery.

**[51]** Based on the evidence the signatures were not forged and as a holder for value of the said PN the plaintiff accepted the said PN in good faith and for value with no notice of defect of title to the same by HSBC USA assigning and transferring without recourse all its rights, title and interest in the said PN by way of a transfer power dated 15 March 2006 which was duly endorsed by HSBC USA for value it received from the plaintiff. The plaintiff as a holder in due course is entitled to be paid by the second defendant.

BOARD OF DIRECTORS RESOLUTIONS

**[52]** The second defendant contends that the signatures of the former directors were forged. DW14 in her report came to the following findings:

> Q/A41
>
> A Paragraph (v) shows that the questioned signatures of Zaitun Binti Ibrahim, Omar Bin Othman, Mokhtar Bin Ismail, Khafiah Binti Rose and Jusoh Bin Awang marked as 'S' to 'W' were different in structure from the specimen signatures 'S1' to 'W1' respectively. Hence, it was not possible to carry out a suitable comparison of the handwriting characteristics to ascertain whether or not these questioned signatures were written by the said writers i.e. Zaitun Binti Ibrahim, Omar Bin Othman, Mokhtar Bin Ismail, Khafiah Binti Rose and Jusoh Bin Awang.

**[53]** The questioned signature were different in structure from the specimen signatures and it was not possible to carry out a suitable comparison of the handwriting characteristics to ascertain whether or not the questioned signatures that of 'Zaitun binti Ibrahim, Omar bin Othman, Mokhtar bin Ismail, Khalifah Rose as well as Jusoh bin Awang'.

**[54]** The questioned signatures on the resolution dated 14 February 2006:

> showed evidence of overwriting indicating that these questions signatures were traced signatures. Hence I am of the opinion that the questioned signatures were not genuine.

**[55]** As such this court cannot come to a finding that those signatures were forged and that the resolutions were in fact also forged. Furthermore the evidence given by the former directors were unconvincing as most of the time they could not remember what exactly took place during the board of directors meetings.

**[56]** Based on all the reasons above and on the totality of the evidence before this court that Mohd Khairuddin and DW2 had acted and represented that the second defendant would guarantee the €10,000,000 financing granted. Therefore the second defendant is bound by the terms of the guarantee.

**[57]** Having considered the entirety of the admissible evidence together with the contemporaneous admitted documents, the submissions as well as the authorities of both parties this court finds that the plaintiff has established its

claim on the balance of probabilities against the second defendant. Based on the above mentioned reasons the plaintiff's claim is allowed with cost.

*Plaintiff's claim allowed with costs.*

Reported by Ashgar Ali Ali Mohamed